Jerneh Insurance Corp Sdn Bhd v Amanah Raya Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R3–12–322 OF 1997
NIK HASHIM J
27 NOVEMBER 1998

Insurance *— Accident insurance — Cause of death — Claim under personal accident policy — Whether death by accident or from disease/infection*

Insurance *— Accident insurance — Construction of policy — Whether deceased's death was occasioned by a disease outside the risk which the exclusion clause applied — Whether exclusion clause was ambiguous*

Insurance *— Contract of insurance — Exclusion clause — Whether applicable when it was not mentioned in the proposal form — Whether clause part of policy*

Insurance *— Proposal form — Inconsistency with policy — Which prevails*

The deceased was insured under a personal accident policy which contains an exclusion clause that excludes the insurer from liability in respect of death caused by disease/infection. The deceased died after attempting to put out a fire on a neighbour's house. The plaintiff ('the respondent') claimed under the policy and was allowed by the sessions court. The defendant ('the appellant') appealed against the decision. The issues which arose were whether: (i) the deceased's death was caused by the accident or had resulted from disease/infection; (ii) the exclusion clause was applicable; (iii) the policy prevailed over the proposal form in the event of inconsistency between the two; (iv) the deceased's death was occasioned by a disease outside the risk which the exclusion clause applied; and (v) there was an ambiguity in the exclusion clause.

Held, allowing the appeal:

(1) Apart from the fact that the deceased died after attempting to put out the fire on the neighbour's house, there was absolutely no evidence to support the learned sessions court judge's findings that there were physical exertion coupled with anxiety and a fall that caused the death. It was clear from the autopsy report (P2) that the death was caused by 'myocardial ischaemia' due to coronary disease and that the death was natural. Death from natural causes is clearly not personal injury by accident (see pp 120F, 121E, G); *Persin Kaur v The Renong Tin Dredging Co Ltd* [1967] 2 MLJ 286 followed.

(2) The policy under consideration is the third of such policy issued by the appellant to the deceased. The deceased must have known of the exclusion clause which is stated at the back of the certificate of membership. Thus, the learned judge was wrong in

deciding that the clause was inapplicable as it was not mentioned in the proposal form and thus, was not a part of the policy (see p 121A–B). A

(3) If there was any inconsistency between the policy and the proposal form, such inconsistency was of no consequence as the policy took precedence, because it was the primary document which was prepared later in time than the proposal form and thus, would represent the formal reduction of the contract in writing between the appellant and the deceased (see p 121C–D); *Syarikat Chin Seng Supermarket v Mui Continental Insurance Sdn Bhd* [1997] 2 CLJ Supp 377 followed. B

(4) The exclusion clause excludes the insurer from liablity in case of, inter alia, death resulting from disease/infection. The deceased's death was occasioned by a disease outside the risk which the exclusion clause applied. Thus, the appellant was not liable under the policy (see p 121D, F). C

(5) There was no ambiguity in the exclusion clause even though the type of disease was not specified in it (see p 121F–G). D

[Bahasa Malaysia summary

Si mati adalah dilindungi di bawah satu polisi kemalangan persendirian yang mengandungi satu fasal pengecualian yang mengecualikan syarikat insurans daripada liabliti berkenaan dengan kematian yang diakibatkan oleh penyakit/jangkitan. Si mati meninggal dunia selepas cuba memadamkan satu kebakaran di rumah jiran beliau. Plaintif ('penentang') menuntut di bawah polisi tersebut dan telah dibenarkan oleh mahkamah sesyen. Defendan ('perayu') merayu terhadap keputusan tersebut. Isu-isu yang timbul adalah sama ada: (i) kematian si mati adalah disebabkan oleh kemalangan atau diakibatkan oleh penyakit/jangkitan; (ii) fasal pengecualian adalah terpakai; (iii) polisi tersebut mengatasi borang cadangan dalam keadaan percanggahan di antara kedua-duanya; (iv) kematian si mati adalah disebabkan oleh penyakit di luar risiko yang mana fasal pengecualian tersebut terpakai; (v) terdapat satu kekaburan pada fasal pengecualian. E F G

Diputuskan, membenarkan rayuan:

(1) Selain daripada fakta bahawa si mati meninggal selepas cuba memadamkan satu kebakaran di rumah jiran beliau, tidak terdapat langsung sebarang keterangan untuk menyokong pencarian hakim mahkamah sesyen yang bijaksana bahawa terdapat keadaan penggunaan tenaga fizikal ditambah dengan kebimbangan dan satu kejatuhan yang menyebabkan kematian tersebut. Adalah jelas daripada laporan autopsi (P2) bahawa kematian tersebut adalah akibat 'myocardial ischaemia' yang disebabkan oleh penyakit jantung dan kematian tersebut adalah semulajadi. Kematian daripada akibat-akibat semulajadi adalah jelas tidak merupakan H I

satu kecederaan persendirian yang disebabkan oleh kemalangan (lihat ms 120F, 121E, G); *Persin Kaur v The Renong Tin Dredging Co Ltd* [1967] 2 MLJ 286 diikut.

(2) Polisi yang dipertimbangkan adalah polisi sedemikian yang ketiga dikeluarkan oleh perayu kepada si mati. Si mati seharusnya mengetahui tentang fasal pengecualian tersebut yang dinyatakan di belakang sijil keahlian. Oleh itu, hakim yang bijaksana adalah salah dalam memutuskan bahawa fasal tersebut adalah tidak terpakai kerana ia tidak dinyatakan dalam borang cadangan dan oleh yang demikian, tidak merupakan sebahagian daripada polisi tersebut (lihat ms 121A–B).

(3) Jika terdapat sebarang percanggahan di antara polisi tersebut dengan borang cadangan, percanggahan tersebut adalah tidak penting kerana polisi tersebut akan mengambil keutamaan, kerana ia adalah dokumen yang utama yang disediakan dalam masa yang lebih lewat daripada borang cadangan dan oleh itu, mewakili pengubahan secara formal kontrak tersebut di antara perayu dan si mati dalam bentuk tulisan (lihat ms 121C–D); *Syarikat Chin Seng Supermarket v Mui Continental Insurance Sdn Bhd* [1997] 2 CLJ Supp 377 diikut.

(4) Fasal pengecualian tersebut mengecualikan syarikat insurans daripada liabliti dalam kes, antara lainnya, kematian yang diakibatkan oleh penyakit/jangkitan. Kematian si mati adalah diakibatkan oleh satu penyakit di luar risiko yang mana fasal pengecualian tersebut terpakai. Oleh itu, perayu adalah tidak bertanggungan di bawah polisi tersebut (lihat ms 121D, F).

(5) Tidak terdapat sebarang kekaburan dalam fasal pengecualian walaupun jenis penyakit tidak dispesifikasikan di dalamnya (lihat ms 121F–G).]

Notes

For cases on acident insurance, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1–9.

For cases on contract of insurance, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 26–29.

For cases on proposal form, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 216–217.

Cases referred to

Etherington and the Lancashire and Yorkshire Accident Insurance Co, Re [1909] 1 KB 591 (refd)

Jason v British Traders' Insurance Co [1969] 1 Lloyd's Rep 281 (refd)

Lawrence v The Accidental Insurance Co Ltd (1881) 7 QBD 216 (refd)

Leong Luen Kiew & Anor v The New Zealand Insurance Co Ltd [1939] MLJ (SSR) 173 (refd)

Persin Kaur v The Renong Tin Dredging Co Ltd [1967] 2 MLJ 286 (folld)

Reynolds v Accidental Insurance Co (1870) 22 LT 820 (refd)
Smith v Accident Insurance Co (1870) LR 5 Exch 302 (refd)
Syarikat Chin Seng Supermarket v Mui Continental Insurance Sdn Bhd [1997] 2 CLJ Supp 377 (folld)
Theobald v Railway Passengers' Assurance Co (1854) 10 Exch 45 (refd)
Trew v Railway Passengers' Assurance Co (1861) 6 H & N 839 (refd)

Appeal from: Summons No 52–6 of 1997 (Sessions Court, Kuala Lumpur)

Ong Keng Swee (*KS Ong & Co*) for the appellant.
K Goik (*BW Yong & Co*) for the respondent.

Cur Adv Vult

Nik Hashim J: This is an appeal against the decision of the learned judge of the sessions court which allowed the respondent's/plaintiff's claim for the sum of RM122,000 together with interest and costs pursuant to a personal accident insurance policy known as 'Amsure Personal Accident Insurance Plan C No 94-711-H2 4819-01' ('the policy') which was issued by the appellant/defendant to one Devia Nathan s/o Savarimuthu ('the deceased'). The policy guarantees payment in the event the policy holder is injured or died as a result of accident. On the 24 November 1994, ie during the currency of the policy from 21 February 1994 to 20 February 1995, it was alleged that the deceased was 'terbunuh dalam satu kejadian kebakaran di rumah beliau' (para 4 of the statement of claim). The beneficiary of the deceased's estate claimed payment under the policy and the appellant had repudiated the claim.

The learned sessions court judge in his judgment at p 31 of record said:

> Di dalam kes ini, adalah fakta yang dipersetujui bahawa si mati meninggal dunia selepas cuba memadamkan satu kebakaran, membawa baldi air, di rumah jirannya. Dari keterangan SP1, terdapat calar-calar di bahu, muka dan badan si mati. Dari kecederaan tersebut, kemungkinan besar si mati telah terjatuh semasa membawa sebaldi air untuk cuba memadamkan kebakaran tersebut. Menurut SP1 lagi, tekanan fisikal itu bersama dengan 'anxiety' dan kejatuhan boleh menyebabkan serangan jantung (triggered the heart attack). Saya berpendapat situasi ini termasuk dalam tafsiran 'kemalangan'. Dan, bukan penyakit saluran darahnya yang menyebabkan kemalangan tersebut, malahan sebaliknya ... .

And he continued at p 32 and said:

> Saya memutuskan fasal pengecualian polisi insuran tersebut tidak terpakai di dalam kes ini.

It is the contention of the learned counsel for the appellant that the trial judge had erred in law and in fact when he held that the deceased died as a result of accident contrary to autopsy reports which state that the death of the deceased was caused by 'myocardial ischaemia due to coronary disease' which is a heart attack. Death caused by disease/infection is excluded from liability under the exclusion clause and therefore the death is not covered by the policy.

Learned counsel for the respondent, on the other hand, argued that the death of the deceased was accidental which was triggered by the fall and/or

A the excessive physical exertion or anxiety while the deceased was trying to put out the fire, and thus the learned judge was right to allow the respondent's claim.

The central issue in this appeal is whether the deceased's death was caused by accident or resulted from disease/infection.

B In order to resolve the above issue, I consider it necessary to reproduce the autopsy report and the exclusion clause of the policy. The pathologist (SP1) from the University Hospital produced the autopsy report (P2) which states as follows:

> Cause of death
>
> C 1 (a) Myocardial ischaemia due to
>
> (b) Coronary artery disease.
>
> Conclusions:
>
> 1 No external injuries which cause or contribute to death.
>
> 2 Death was natural.
>
> D
>
Sgd	Sgd
Dr Ong Beng Beng	Assoc Prof P Jayalakshmi
Master of Pathology MO	Lecturer/Pathologist
MBBS	MBBS, MPath, MRCPath

The policy contained the exclusion clause at the back of the policy E certificate and it states:

> Once an eligible individual has been accepted under the Amsure Personal Accident Insurance Plan C, his coverage *will not be effective* for the following:
>
> (1) ... (2) ... (3) ... (4) ... (5) ... (6) Disease/Infection ...
>
> This means that the Amsure Personal Accident Insurance Plan C excludes F coverage for death, permanent disablement or any incurred medical expenses due to injury, resulting directly or indirectly from the above mentioned list. Hence, accidents arising from the abovementioned list are not covered and the insurer is *not* liable to pay any benefits. (Emphasis added.)

It is to be noted that the agreed facts are only restricted to the facts: 'si mati G meninggal selepas cuba memadamkan satu kebakaran di rumah jiran beliau' (P13 of record) (the deceased died after attempting to put out the fire on the neighbour's house). The cause of death however, is disputed. The respondent's case rested on the agreed facts and the evidence of the pathologist (SP1), while the appellant called the assistant manager (SD1) to testify on its behalf. This is what SD1 said, among other things, in his evidence:

H

> I classify his death as illness. This was based on the autopsy report. This illness is not covered under the policy —
>
> Deceased's death is one of the illness not covered.
> (para B-C — p 21 of record)
>
> The autopsy report is crucial in order for the company to make payment.
> I (Para C p 23 of record).

Having considered the evidence and the submissions of counsel on the issue, I hold that there is much merit in the appeal. The policy in dispute is

an insurance coverage for personal accident. The word 'accident' is not defined in the policy. In the absence of the definition, the word must be given its plain and ordinary meaning. The *Concise Oxford Dictionary* (9th Ed) defines 'accident' to mean: (1) an event that is without apparent cause, or is unexpected; (2) an unfortunate event, especially one causing physical harm or damage, brought about unintentionally. A B

To come within the policy it must be shown that the insured is injured by accident. The accident must be the proximate cause of the death. For example, where the insured by misadventure goes in front of a train and is run over (*Lawrence v The Accidental Insurance Co Ltd* (1881) 7 QBD 216); falls into a stream and is drowned (*Reynolds v Accidental Insurance Co* (1870) 22 LT 820); slips on a step (*Theobald v Railway Passengers Assurance Co* (1854) 10 Exch 45); is thrown from a horse (*Re Etherington and The Lancashire and Yorkshire Accident Insurance Co* [1909] 1 KB 591, (CA)); is suffocated by smoke from a burning house (*Trew v Railway Passengers Assurance Co* (1861) 6 H & N 839 at p 844), the insured is entitled to recover under the policy, subject to any exception in the policy, by which liability in respect of the particular misadventure in question is excluded (see *Personal Accident Insurance (I) in General* (Vol 25) para 595 at p 312). The exception may be so worded as to exclude disease, however caused, and then if the death is caused by an excepted disease, the insurers will not be liable even though the disease is proximately caused by accident (see *Smith v Accident Insurance Co* (1870) LR 5 Exch 302 at p 309; *Jason v British Traders' Insurance Co* [1969] 1 Lloyd's Rep 281). The burden is on the claimant to prove that the injury has caused the death in the manner provided by the policy independently of any other cause and that if the claimant cannot discharge that onus, his action must fail (see *Leong Luen Kiew & Anor v The New Zealand Insurance Co Ltd* [1939] MLJ (SSR) 173). C D E F

In the present case, the respondent failed to prove that the deceased died as a result of accident. Apart from the agreed facts that the deceased died after attempting to put out the fire on the neighbour's house, there is absolutely no evidence to support the judge's finding that there was physical exertion coupled with anxiety and a fall that caused the death. The finding of the learned judge that the situation was within the definition of 'accident' is a mere conjecture. So too, is the finding that the deceased 'telah terjatuh semasa membawa sebaldi air.' These findings are clearly unsupported by any evidence. There is no evidence that the deceased had fallen down and that he was carrying a pail of water. What was admitted as agreed facts is just that he died after 'attempting to put out the fire on the neighbour's house.' In my view, the agreed facts do not constitute accident. What was told by the police to SP1 as to what had happened to the deceased prior to being sent to University Hospital, is plain hearsay. Although there were abrasions to the deceased's shoulder, face and body, these did not cause the deceased's death. SP1 in his evidence testified clearly that 'no external injuries which cause or contribute to death.' Therefore, the decision of the trial judge that 'saya berpendapat situasi ini termasuk dalam tafsiran "kemalangan". Dan, bukan penyakit saluran darahnya yang menyebabkan kemalangan tersebut, malahan sebaliknya ...' is indeed perverse. There is G H I

A simply no evidence whatsoever to support such finding. In my judgment, the disease is the proximate cause of the deceased's death, and the deceased died naturally from coronary artery disease, ie heart attack.

With regard to the exclusion clause, the respondent's counsel argued that since the exclusion clause was not mentioned in the proposal form, it B could not be part of the policy and therefore inapplicable in this case. On this point, the learned judge fell into error. It is to be noted that the policy under consideration is the third of such policy issued by the appellant to the deceased (p 22 of record). The deceased must have known of the exclusion clause which is stated at the back of the Certificate of Membership (p 72 of record) and the certificate states very clearly that the appellant promises to C indemnify the insured deceased 'according to the terms, conditions and exclusions detailed at the back of this certificate ...'. Even if there is any inconsistency between the policy and the proposal form, such inconsistency is of no consequence as the policy takes precedence, because it is the primary document which is prepared later in time than the proposal form and thus, represents the formal reduction of the contract in writing between D the appellant and the deceased (see *Syarikat Chin Seng Supermarket v Mui Continental Insurance Sdn Bhd* [1997] 2 CLJ Supp 377).

The exclusion clause is very clear in its term and it means what it says. It is part of the policy. The clause excludes the insurer/appellant from liability in case of death, permanent disablement or any incurred medical expenses E due to injury, resulting from 'disease/infection'. Death caused by disease/infection is not covered by the policy. It is clear from the autopsy report of SP1 that the death was caused by 'myocardial ischaemia' due to coronary artery disease and he was of the view that the death was natural. This opinion was shared and certified by another pathologist, Dr Ong Beng Beng who together with SP1 signed the autopsy report (P2). Thus, with the clear and F unchallenged medical evidence before the court, it would not be right for the learned judge to ignore the evidence and to make the finding contrary to facts before the court. To my mind, the deceased's death comes within the exclusion clause and hence, the appellant is not liable under the policy. The deceased's death was occasioned by a disease outside the risk which the G exclusion clause applied. There is no ambiguity in the exclusion clause even though the type of disease was not specified therein. The sessions court judge erred in holding that the exclusion clause was ambiguous. Death from natural causes is clearly not personal injury by accident (*Persin Kaur v The Renong Tin Dredging Co Ltd* [1967] 2 MLJ 286 at p 288I).

H The deceased's caring action to put out the fire is highly commendable. Indeed, I sympathise with his family over his death. But sympathy is no ground for the grant of the personal accident coverage outside the policy.

For the reasons I have stated, I would allow this appeal, set aside the order of the sessions court, with costs to the appellant.

I *Appeal allowed.*

Reported by Tan Kah Bee